

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

K.S., by her guardian ad litem,
Kenneth L. Isserlis, DOROTHY
SPIOTTA and PAUL SPIOTTA,,

No. CV-08-243-FVS

Plaintiffs,

ORDER DENYING MOTIONS AS
PREMATURE

V.

AMBASSADOR PROGRAMS, INC., et
al.,

Defendants.

THIS MATTER comes before the Court without oral argument. K.S., Dorothy Spiotta, and Paul Spiotta are represented by Timothy K. Ford and Katherine C. Chamberlain. Kenneth Isserlis is the guardian ad litem for K.S. Defendants Ambassador Programs, Inc., and Ambassadors Group, Inc., are represented by Brian T. Rekofke, Jerry S. Phillips, and Geana M. Van Dessel. Defendant People to People International Inc. is represented by James B. King.

BACKGROUND

K.S. is the minor daughter of Dorothy and Paul Spiotta. The Spiottas live in the State of Virginia. During the Fall of 2005, they learned about a study-abroad program in Australia. K.S. applied to participate. Her application was submitted electronically. She may have submitted it herself, or her father may have submitted it on her behalf. The record is unclear. In any event, the application stated

1 in part:

2 The venue for any disputes regarding this agreement or the
3 program shall be Superior Court of Spokane County, Spokane,
4 Washington. This agreement shall be construed in accordance
5 with the laws of the state of Washington.

6 K.S. left for Australia on July 25, 2006. She returned on August
7 13th. According to her parents, she had lost 19 pounds and was
8 dangerously malnourished by the time she returned. On August 14th,
9 she was hospitalized. During the course of the next five months, she
10 spent about seven weeks in a hospital. On July 24, 2008, K.S. and her
11 parents ("the plaintiffs") filed an action against Ambassador
12 Programs, Inc., Ambassadors Group, Inc., and People to People
13 International. The first two defendants are Delaware corporations
14 whose principal place of business is in Spokane, Washington. The
15 third defendant is a Missouri corporation. The location of its
16 principal place of business is unclear. By agreement of the parties,
17 the plaintiffs filed a "Second Amended Complaint for Damages" on
18 October 29, 2008. They allege negligence, fraud, violation of a
19 consumer protection act, and breach of contract. They seek in excess
20 of \$75,000.00 in damages. The Court has original jurisdiction over
21 the subject matter of the action based upon diversity of citizenship.
22 28 U.S.C. § 1332.

23 **CHOICE OF LAW**

24 "Federal courts sitting in diversity look to the law of the forum
25 state when making choice of law determinations." *Hoffman v. Citibank,*
26 *N.A.*, 546 F.3d 1078, 1082 (9th Cir.2008) (*per curiam*). The existence
 of a choice-of-law clause does not change the analysis. *See, e.g.,*

1 *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 937 (9th
 2 Cir.2001).¹

3 A. Actual Conflict

4 Under the State of Washington's choice-of-law rules, the first
 5 issue is whether an actual conflict exists between the laws of the
 6 States of Washington and Virginia. *Erwin v. Cotter Health Centers*,
 7 161 Wn.2d 676, 692, 167 P.3d 1112 (2007). Absent an actual conflict,
 8 local law applies. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 100-
 9 01, 864 P.2d 937 (1994). The defendants deny that a conflict exists.
 10 In essence, they submit the plaintiffs must demonstrate the following
 11 in order to establish the existence of a conflict: (1) that they have
 12 pled claims that are based expressly upon Virginia law, (2) that they
 13 have pled facts that support the relief they are seeking under
 14 Virginia law, and (3) that, given the facts they have pled, they are
 15 not entitled to the same relief under Washington law. As the
 16 defendants see it, not only have the plaintiffs failed to plead claims
 17 that are based expressly upon Virginia law, but also they have failed
 18 to allege facts that support the relief they are seeking. It follows,
 19 say the defendants, that a conflict cannot exist. Needless to say,
 20 the plaintiffs disagree. However, instead of attempting to show that
 21 the SAC adequately pleads Virginia law, they filed a motion on
 22 February 20, 2009, seeking leave to file a "Third Amended Complaint
 23

24
 25 ¹A different rule applies when a federal court is sitting in
 26 admiralty. *Aqua-Marine Constructors, Inc. v. Banks*, 110 F.3d
 663, 670 (9th Cir.1997), cert. denied, 522 U.S. 933, 118 S.Ct.
 339, 139 L.Ed.2d 263 (1997).

1 for Damages." In view of this development, the Court will defer
2 ruling with respect to whether an actual conflict exists until after
3 it decides whether to permit the amendment sought by the plaintiffs.

4 B. Choice-of-Law Clause

5 K.S. and/or her parents allegedly entered into an agreement with
6 the sponsor of the study-abroad program. The alleged agreement states
7 in part:

8 The venue for any disputes regarding this agreement or the
9 program shall be Superior Court of Spokane County, Spokane,
10 Washington. This agreement shall be construed in accordance
with the laws of the state of Washington.

11 The preceding language raises several issues. One is whether K.S., as
12 opposed to her father, is bound by the choice-of-law clause. *Cf.*
13 *Oltman v. Holland America Line USA, Inc.*, 163 Wn.2d 236, 250, 178 P.3d
14 981 ("A forum selection clause is not binding on a third party who did
15 not agree to the contract in which the clause is found."), *cert.*
16 *denied*, --- U.S. ----, 129 S.Ct. 24, 171 L.Ed.2d 927 (2008); *Scott v.*
17 *Pacific West Mt. Resort*, 119 Wn.2d 484, 495, 834 P.2d 6 (1992) ("to
18 the extent a parent's release of a third party's liability for
19 negligence purports to bar a child's own cause of action, it violates
20 public policy and is unenforceable").² A second issue is whether the
21 choice-of-law clause is effective. *See, e.g., Erwin*, 161 Wn.2d at
22 693-700. A third issue is whether the parties intended the choice-of-
23 law clause to cover non-contract claims. *Hearst Communications, Inc.*

25
26

²Neither of the above-cited cases is on point. They may or
may not provide useful guidance. They are cited solely to
indicate that an issue exists.

1 v. *Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005)
2 (Washington courts "attempt to determine the parties' intent by
3 focusing on the objective manifestations of the agreement, rather than
4 on the unexpressed subjective intent of the parties"). If the parties
5 intended to limit the choice-of-law clause to contract claims, then
6 the choice-of-law clause may not govern the plaintiffs' non-contract
7 claims. See *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107,
8 159, 744 P.2d 1032, 750 P.2d 254 (1987) ("Although a choice of law
9 provision in a contract does not govern tort claims arising out of the
10 contract, it may be considered as an element in the most significant
11 relationship test used in tort cases."). At this point, the record is
12 insufficiently well developed to permit the Court to resolve the
13 issues described above. After the parties have had an adequate
14 opportunity to conduct discovery, they may move for summary judgment.
15 At that point, they will be in a better position to discuss whether
16 K.S. is bound by the choice-of-law clause, whether it is effective,
17 and whether the parties intended the choice-of-law clause to govern
18 non-contract claims. If it turns out that K.S. is bound by the clause
19 and that it is effective, but that it does not govern non-contract
20 claims, then the parties will need to discuss whether, under
21 Washington's choice-of-law rules, the plaintiffs' non-contract claims
22 are governed by local or foreign law.

23 **CONSUMER PROTECTION ACT**

24 The "Third Claim for Relief" in the SAC is entitled "Violation of
25 the Consumer Protection Act." (Emphasis in SAC.) Defendants
26 Ambassador Programs, Inc., and Ambassadors Group, Inc., assume the

1 plaintiffs' consumer-protection-act claim is based upon Washington
2 law. They seek a ruling that K.S. may not recover damages for
3 personal injury or emotional distress under Washington's Consumer
4 Protection Act. Chapter 19.86 RCW. The plaintiffs object. To begin
5 with, they argue that the defendants are relying upon information
6 outside the pleadings. Thus, in the plaintiffs' opinion, the
7 defendants' motion is a thinly-disguised summary judgment motion. In
8 the plaintiffs' opinion, the improper designation is significant.
9 Were the motion properly designated, say the plaintiffs, they likely
10 would ask the Court to refrain from ruling until they have had a
11 reasonable opportunity to conduct discovery. Fed.R.Civ.P. 56(f).
12 There is a second reason why the plaintiffs object to the defendants'
13 motion. According to the plaintiffs, it is based upon an unwarranted
14 assumption. They insist (pace the defendants) that their consumer-
15 protection-act claim is not based upon Washington law. To the
16 contrary, they argue that it is based upon Virginia law. They further
17 argue that, under Virginia law, they are entitled to seek damages for
18 physical pain and emotional distress. Resolution of the parties'
19 competing contentions must await another day. The threshold issue is
20 whether their consumer-protection-act claim is governed by Virginia
21 law or Washington law. Until that issue is resolved, the defendants'
22 motion to limit K.S.'s damages is premature.

23 **IT IS HEREBY ORDERED:**

24 1. "Defendants' Motion to Strike" (**Ct. Rec. 37**) is denied as
25 premature with leave to refile.

26 2. "Ambassador Defendants' Motion to Dismiss" (**Ct. Rec. 46**) is

denied as premature with leave to refile.

IT IS SO ORDERED. The District Court Executive is hereby directed to enter this order and furnish copies to counsel.

DATED this 27th day of February, 2009.

s/Fred Van Sickle
Fred Van Sickle
Senior United States District Judge